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ATTORNEYS AT LAW

August 8, 2001

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, DC 20554

Re: VoiceLog Petition for Reconsideration, and Petition for a Partial
Limited Stay, CC Docket No. 94-129

Dear Ms. Salas:

The attached letter was hand delivered to Ms. Attwood and Mr. Rogovin today.

In accordance with the Commission's rules, a copy of this letter is being filed electronically in the above-captioned docket.

Sincerely,



Fred B. Campbell, Jr.

FBC/krs
Attachment

August 8, 2001

Ms. Dorothy Attwood
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Mr. John Rogovin
Deputy General Counsel
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: VoiceLog Petition for Reconsideration, and Petition for a Partial
Limited Stay, CC Docket No. 94-129

Dear Ms. Attwood and Mr. Rogovin:

VoiceLog LLC; Clear World Communications Corporation; Plan B Communications, Inc.; Capsule Communications, Inc.; IsTerra; TransWorld Network, Corp.; and AT&T Corp. are writing in further support of VoiceLog's petition for reconsideration, filed in the above-captioned docket, seeking reconsideration of the Commission's Third Report and Order modifying Rule 64.1120(c)(3)(ii), insofar as it requires a telephone marketer to drop off the line once the customer begins third party verification (the "drop-off" rule).¹ We believe that, in addition to the reasons set forth in VoiceLog's petition and in comments submitted to date, VoiceLog's petition for reconsideration must be granted because the drop-off rule is an unconstitutional abridgement of First Amendment rights of free speech. As the Supreme Court again made clear in *Lorillard Tobacco Co. v. Reilly*, No. 00-596, slip op. at 31 (June 28, 2001), there must be a "reasonable fit between the means and ends of the regulatory scheme." No such "reasonable fit" exists with respect to the drop-off rule as it currently stands, and in fact, modification of the rule along the lines suggest by VoiceLog in its petition for reconsideration is required in order to create a "reasonable fit."

¹ Clear World Communications Corporation; Capsule Communications, Inc.; IsTerra, a division of Primus; and TransWorld Network, Corp. all provide long distance telephone services. Plan B Communications, Inc. provides local and long distance telephone services, and AT&T Corp. provides local and long distance telephone services, among others. A separate filing by Capsule Communications, Inc., which has previously been filed with the Commission, is attached hereto in its entirety.

To determine whether a regulation of commercial speech is permissible, the Supreme Court has developed a four-part framework for analysis:

- “At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”
- “Next, we ask whether the asserted governmental interest is substantial.”
- “If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and”
- [We must determine] whether it is not more extensive than is necessary to serve that interest.”

Lorillard, slip op. at 24 (quoting *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980)).

It is undisputable that soliciting a customer to change his or her presubscribed telecommunications carrier is expression protected by the First Amendment. See *Lorillard*, slip op. at 23 (“For over 25 years, the Court has recognized that commercial speech does not fall outside the purview of the First Amendment.”). Nondeceptive solicitation of a customer to change his or her presubscribed telecommunications carrier is clearly a lawful activity. Accordingly, insofar as a telecommunications carrier or marketing agent communicates with a customer to provide truthful, non-misleading information, that communication is commercial speech subject to the protection of the First Amendment.

It is also indisputable that the “drop off” rule itself is a regulation of speech, and not mere conduct. The clear purpose of the “drop off” rule is to preclude a marketer from speaking to the customer during the verification by excluding the marketer from the conversation altogether once connection between the customer and the third party verifier has been established. *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996*, FCC 00-255 at ¶¶ 35-38 (rel. Aug. 15, 2000) (“*Third Report and Order*”). A marketer who is not on the line cannot speak and therefore, the Commission reasoned, cannot “improperly influence[e] subscribers.” *Third Report & Order* at ¶ 38. Of course, the “drop off” rule also precludes a consumer from obtaining, at the time he or she is asked to verify his or her intent to change presubscribed carriers, truthful, non-misleading information that may be important to that consumer’s decision.

We do not dispute that the Commission’s asserted interest in ensuring that consumers voluntarily choose to change telecommunications carriers, and in ensuring that consumers are not subject to undue influence when verifying their intent to change telecommunications carriers may be a substantial governmental interest. Undue influence in the verification process can theoretically be a problem (although the record here fails to show any actual harm), and by forbidding the mere presence of telemarketing personnel during the verification process, the “drop off” rule eliminates all

speech by telemarketing personnel during the third party verification process and thereby alleviates any potential problem of undue influence.

The problem with the “drop off” rule, however, is that in order to curtail some problematic speech, it halts all speech. The “drop off” rule fails constitutional scrutiny under the last step of the *Central Hudson* analysis, i.e., “asking whether the speech restriction is not more extensive than necessary to serve the interests that support it.” *Lorillard*, slip op. at 26 (quoting *Greater New Orleans Broadcasting Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999)). The Court has made clear that “the case law requires a reasonable ‘fit between the [agency’s] ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective.’” *Id.* (alteration in original) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). The fit is not required to be “perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is ‘in proportion to the interest served.’” *Board of Trustees of State Univ. of N.Y.*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

The “drop off” rule is not a regulation that “went only marginally beyond what would adequately have served the governmental interest,” *id.* at 479, but one that is “substantially excessive, disregarding ‘far less restrictive and more precise means.’” *Id.* (quoting *Shapiro v. Kentucky Bar Ass’n*, 486 U.S. 466, 476 (1988)). Carriers and marketers “have an interest in conveying truthful information about their products” to consumers, and consumers “have a corresponding interest in receiving truthful information” about telecommunications products. See *Lorillard*, slip op. at 34. Nothing in the record suggests that this interest ends during the third party verification process. In fact, experience has shown that when asked by the verifier whether he or she wishes to confirm his or her intent to change presubscribed long distance carriers, consumers will sometimes then seek to confirm critical aspects of the calling plan they are selecting, such as the interstate rate, the rate to particular international destinations, or the applicable monthly fees. When provided in a truthful and non-misleading manner, this information facilitates consumer choice, and is protected by the First Amendment.

Moreover, there is no alternative means for the consumer to get access to information he or she may desire during the verification call, other than from a carrier’s or marketer’s personnel on the line at the time. As VoiceLog’s petition and comments filed in the record have made clear, once the marketing personnel has dropped off the line, he or she cannot be easily (if at all) reconnected to answer a consumer inquiry. Commission rules preclude the third party verifier from providing marketing information, so even if the consumer reaches a live operator, the operator cannot supply information about the calling plan under consideration by the consumer. Like the advertising restrictions at issue in *Lorillard*, the “drop off” rule therefore precludes the retailer from providing information necessary to an instant transaction. *Lorillard*, slip op. at 35.

By contrast, the modification to the “drop off” rule proposed by VoiceLog is a much more tailored regulation. Under VoiceLog’s proposal, a carrier or marketer would not have to drop-off the line after connecting a consumer to a third party verifier, but – in a conversation required to be recorded and preserved for two years under other FCC rules – could remain on the line to provide

certain types of navigation assistance (such as assistance in reaching the live operator), assistance in terminating the verification, and neutral, factual information in response to a consumer inquiry. At the conclusion of the verification process, marketing personnel could also resume discussions with customers regarding other offerings (such as nonregulated services) that are not subject to the Commission's carrier selection rules. Rather than simply stifling all marketer/consumer speech, the VoiceLog proposed rule is one that respects the First Amendment interests of the carrier and the consumer in exchanging truthful, non-misleading information, but which still protects the consumer against misleading information or unsolicited information intended to mold or direct the consumer's answers to verification questions.

Enforcement concerns also do not justify the lack of a fit between the FCC's objectives and the "drop off" rule. The FCC required-recording of the third-party verification will provide the basis for enforcing a tailored rule, such as the one VoiceLog has proposed, because the Commission can use the recording to evaluate compliance. Although VoiceLog's proposed rule means that the Commission must evaluate these recordings to determine whether the carrier or its agents met regulatory standards, this is appropriate and necessary because the First Amendment "impos[es] on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful." *Shapiro v. Kentucky Bar Assoc.*, 486 U.S. 466, 476 (1988). Moreover, violations of either the "drop off" rule or the rules VoiceLog proposed in its stay request or on reconsideration will only surface from customer complaints, so the full "drop off" rule provides no additional consumer protection and is no less of a burden on administrative resources from an enforcement standpoint.

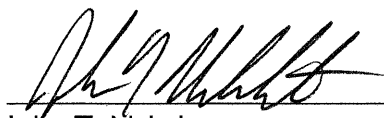
As the Court observed in *Lorillard*, "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 36. Like the outdoor advertising regulations at issue in *Lorillard*, that is precisely what the "drop-off" rule does.

Finally, because the "drop off" rule is not narrowly tailored to a significant governmental interest, it also cannot be justified as a regulation of the time, place and manner of speech. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). The standard for evaluating whether a time, place and manner regulation is narrowly tailored is essentially the same as the standard for evaluating whether regulation of commercial speech is permissible. *Board of Trustees of State Univ. of N.Y.*, 492 U.S. at 477; see also *Lorillard*, slip op. at 24.

Ms. Dorothy Attwood
Mr. John Rogovin
August 8, 2001
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Accordingly, we urge the Commission promptly to grant VoiceLog's petition for reconsideration, and to modify the "drop-off" rule so that the Commission's third party verification regulations are narrowly-tailored and do not unnecessarily abridge commercial speech protected by the First Amendment. At a minimum, the Commission should immediately grant VoiceLog's request for a limited partial stay pending further review so that it reduces its encroachment on protected speech.

Sincerely,



John T. Nakahata
Counsel to VoiceLog
Harris, Wiltshire & Grannis LLP
1200 18th Street, N.W.
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Mike Mancuso
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Tom Jones
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Ms. Dorothy Attwood

Mr. John Rogovin

August 8, 2001

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c: Kyle Dixon, Legal Advisor to Chairman Powell
Carol Matthey, Deputy Bureau Chief, Common Carrier Bureau
Katherine Schroeder, Chief, Accounting Policy Division, Common Carrier Bureau
A. Michele Walters, Associate Chief, Accounting Policy Division, Common Carrier Bureau
Jack Zinman, Counsel to the Bureau Chief, Common Carrier Bureau
Perlesta Hollingsworth, Accounting Policy Division, Common Carrier Bureau
Linda Kinney, Associate General Counsel, Office of the General Counsel
Debra Weiner, Office of the General Counsel

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July 16, 2001
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Sincerely,

A handwritten signature in black ink, appearing to be "Tom Jones", written over a horizontal line.

John T. Nakahata
Counsel to VoiceLog
Harris, Wiltshire & Grannis, LLP
1200 18th Street, NW
Washington, DC 20036
(202) 730-1300


Tom Jones
Director of Telecommunications
Plan B Communications, Inc.
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(732) 345-7000

Ms. Dorothy Attwood
Mr. John Rogovin
July 16, 2001
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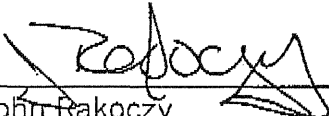
A handwritten signature in dark ink, appearing to read "John T. Nakahata", is written over a horizontal line.

Ms. Dorothy Attwood
Mr. John Rogovin
July 16, 2001
Page 6 of 5

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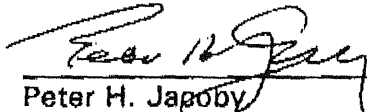

John Rakoczy
President
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7702 Woodland Center Blvd. Ste. 50
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(813) 890-2200

Ms. Dorothy Attwood
Mr. John Rogovin
July 16, 2001
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Peter H. Jagoby
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(908) 221-4243



July 30, 2001

Ms. Dorothy Attwood
Chief
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Mr. John Rogovin
Deputy General Counsel
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: VoiceLog Petition for Reconsideration, and Petition for a Partial
Limited Stay, CC Docket No. 94-129

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Ms. Dorothy Attwood
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July 16, 2001
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To determine whether a regulation of commercial speech is permissible, the Supreme Court has developed a four-part framework for analysis:

- "At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading."
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Ms. Dorothy Attwood
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harm), and by forbidding the mere presence of telemarketing personnel during the verification process, the "drop off" rule eliminates all speech by telemarketing personnel during the third party verification process and thereby alleviates any potential problem of undue influence.

The problem with the "drop off" rule, however, is that in order to curtail some problematic speech, it halts all speech. The "drop off" rule fails constitutional scrutiny under the last step of the *Central Hudson* analysis, i.e., "asking whether the speech restriction is not more extensive than necessary to serve the interests that support it." *Lorillard*, slip op. at 26 (quoting *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 188 (1999)). The Court has made clear that "the case law requires a reasonable 'fit' between the [agency's] ends and the means chosen to accomplish those ends, . . . a means narrowly tailored to achieve the desired objective." *Id.* (alteration in original) (quoting *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)). The fit is not required to be "perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Board of Trustees of State Univ. of N.Y.*, 492 U.S. at 480 (quoting *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

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Ms. Dorothy Attwood
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July 16, 2001
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By contrast, the modification to the "drop off" rule proposed by VoiceLog is a much more tailored regulation. Under VoiceLog's proposal, a carrier or marketer would not have to drop-off the line after connecting a consumer to a third party verifier, but – in a conversation required to be recorded and preserved for two years under other FCC rules – could remain on the line to provide certain types of navigation assistance (such as assistance in reaching the live operator), assistance in terminating the verification, and neutral, factual information in response to a consumer inquiry. At the conclusion of the verification process, marketing personnel could also resume discussions with customers regarding other offerings (such as nonregulated services) that are not subject to the Commission's carrier selection rules. Rather than simply stifling all marketer/consumer speech, the VoiceLog proposed rule is one that respects the First Amendment interests of the carrier and the consumer in exchanging truthful, non-misleading information, but which still protects the consumer against misleading information or unsolicited information intended to mold or direct the consumer's answers to verification questions.

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As the Court observed in *Lorillard*, "a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products." *Id.* at 36. Like the outdoor advertising regulations at issue in *Lorillard*, that is precisely what the "drop-off" rule does.


Finally, because the "drop off" rule is not narrowly tailored to a significant governmental interest, it also cannot be justified as a regulation of the time, place and manner of speech. See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). The standard for evaluating whether a time, place and manner regulation is narrowly-tailored is essentially the same as the standard for evaluating whether regulation of commercial speech is

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Accordingly, we urge the Commission promptly to grant VoiceLog's petition for reconsideration, and to modify the "drop-off" rule so that the Commission's third party verification regulations are narrowly-tailored and do not unnecessarily abridge commercial speech protected by the First Amendment. At a minimum, the Commission should immediately grant VoiceLog's request for a limited partial stay pending further review so that it reduces its encroachment on protected speech.

Sincerely,


David B. Hurwitz
President & CEO

capsule
communications 